

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ALEC J. MEGIBOW, M.D., as assignee of
Jennie Rosario, a/k/a Jenny Rosario,
08 CV 519 (NDNY),

Plaintiff

-v-

Fred Hagen, Chief Benefits Officer,
1199SEIU BENEFIT & PENSION FUNDS,
as duly authorized designee of the Board of Trustees
of the 1199SEIU Benefit Fund for Health and Human
Service Employees,

Defendant.
-----X

Civil Action No.
09 cv 6993 (AKH)(RLE)

NY COUNTY CLERK INDEX NO.106627/09

PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO
“DEFENDANTS’ [sic] MOTION TO DISMISS
IN LEIU [sic] OF AN ANSWER”
PURSUANT TO FRCP RULE 12

TABLE OF CONTENTS

Contents.....i

Relief requested.....1

Point One—12(c).....1

Point Two---12(b)(6).....1

Point Three---12(b)(1).....2

Conclusion.....2

EXHIBITS

- 1. Agreement integration clause.
- 2. Agreement signature page.

RELIEF REQUESTED

Plaintiff requests that to the extent defendant's motion be entertained at all by the Court, that it be given Rule 12(d) treatment and converted to a motion for summary judgment pursuant to Rule 56, by reason of defendant's motion being based substantially upon matters outside the pleading[s] herein.

POINT ONE--12(c)

Defendant's motion, based in part on Rule 12(c) (Notice of Motion) must be denied as premature since the pleadings herein have not been "closed."

POINT TWO—12(b)(6)

Defendant's 12(b)(6) dismissal argument must fail on two grounds:

A) It is based exclusively on material set forth in defendant's Summary Plan Description (SPD), an one hundred sixty-eight (168) page document external to both the complaint and the Summons with Notice of Claim, and, without more, requires the Court to treat the motion pursuant to Rule 12(d) as a motion for summary judgment pursuant to Rule 56, with, *inter alia*, a renewed briefing schedule; and,

B) By such reliance (on the SPD) further violates the Agreement drafted by defendant's counsel by contravening the contract's integration clause (Ex. 1 hereto) ¶ 16, page 8, annexed as Exhibit A to the complaint herein, and whose signature page is annexed as Exhibit A to the Summons with Notice of Claim (Ex. 2 hereto).

POINT THREE--12(b)(1)

To the extent that defendant's motion is premised in part on Rule 12(b)(1) (lack of subject matter jurisdiction) (Notice of Motion), the Court is respectfully requested to remand the case forthwith pursuant to 28 U.S.C. § 1447(c) upon the ground that defendant, by this motion, avers that this Court lacks subject matter jurisdiction in contradiction to defendant's jurisdictional statement in its Notice of Removal.

CONCLUSION

It is respectfully submitted that an order issue (I) remanding this case to Supreme Court, New York County; and, (II) declaring defendant in default of pleading; and, denying defendant's current Rule 12 motion in its entirety; and/or for such other and further relief deemed appropriate to this Honourable Court.

Dated:
New York NY
September 23, 2009

Respectfully submitted,

/s/Anthony M. Bentley
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